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No. 435

In the Supreme Court of the United States

OCTOBER TERM, 1945

[redacted] INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION [redacted]

v.

WATERMAN STEAMSHIP CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

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NO. 435

EMORY S. LAND, INDIVIDUALLY AND AS CHAIRMAN OF THE UNITED STATES MARITIME COMMISSION ET AL., PETITIONERS

v.

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R. 37–38) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 43–54) is reported at 151 F. 2d 292.

JURISDICTION

The judgment of the Court of Appeals was entered on June 18, 1945 (R. 54). The petition for a writ of certiorari was filed on September 18,

1945, and granted on November 5, 1945 (R. 56). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether a United States district court has jurisdiction to entertain an action by a steamship company for a declaratory judgment and an injunction against the Chairman of the Maritime Commission and the Commission's Price Adjustment Board, to establish that certain contracts of the company are not subject to the Renegotiation Act, where the Board has merely notified the company of a renegotiation conference and requested certain information, and where no order has been issued determining that the contracts are subject to the Act, or that excessive profits have been realized thereunder.

2. If so, whether the court should refuse to exercise such jurisdiction, as a matter of discretion.

STATUTE INVOLVED

The Renegotiation Act is set forth in a separate pamphlet filed with the petition for a writ of certiorari, and entitled "The Renegotiation Act." References to this document will be designated "Pamphlet, p. —", throughout this brief.

STATEMENT

On June 27, 1944, respondent, Waterman Steamship Corporation, filed a complaint in the

District Court of the United States for the District of Columbia, against the Chairman of the United States Maritime Commission and the members of the Maritime Commission Price Adjustment Board, seeking a declaratory judgment that certain contracts to which it was a party were not subject to the Renegotiation Act, and praying that renegotiation proceedings with respect to such contracts be enjoined (R. 1–35).[1]

The facts as alleged in the complaint, and as shown by the documents and statutes referred to therein, may be summarized as follows:

Respondent owns and operates a large fleet of ocean-going merchant vessels. On and after

[1] Unless otherwise specified, the provisions of the Renegotiation Act referred to in this brief are those in effect immediately prior to the enactment of the Revenue Act of 1943, approved February 25, 1944, 58 Stat. 21, 78. The original Act was contained in Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942, 56 Stat. 226, and was amended by the Revenue Act of 1942, approved October 21, 1942, 56 Stat, 798, the Military Appropriation Act, 1944, approved July 1, 1943, 57 Stat. 347, the Act of July 14, 1943, 57 Stat. 564, and the Revenue Act of 1943, *supra*, the last of which supplied the title "Renegotiation Act." The amendments in the Revenue Act of 1943 were in general made effective only as to fiscal years ending after June 30, 1943, but the *de novo* review of renegotiation orders by the Tax Court, added by the Revenue Act of 1943, was made applicable to prior fiscal years. See Section 701 (d) of the Revenue Act of 1943, Pamphlet, p. 49.

The pertinent provisions of these statutes are collected and separately printed in the Pamphlet filed with the petition for a writ of certiorari.

April 25, 1941, respondent entered into a number of charter parties (the "Red Sea Charters"), in form with the British Ministry of War Transport, an agency of the British Government, whereby twelve steamships were chartered by respondent to the latter for the transportation of war goods from the United States to ports on the Gulf of Aden and the Red Sea (R. 2–6, 13).[2] By agreement between the British and American Governments, the Maritime Commission undertook to make the payments to respondent which the British Ministry of War Transport was required to make under these charters (R. 4–5, 20). The charters were performed by respondent, and the charter hire, with the exception of certain demurrage items, was paid to respondent on or before November 28, 1941 (R. 5, 30). (The Red Sea Charters of respondent and of other shipping companies are discussed in a 1944 report by a Congressional subcommittee, summarized in the footnote.[3])

On April 28, 1942, the Renegotiation Act became law, and as subsequently amended, "au-

[2] The charter parties were approved by the Maritime Commission in accordance with Section 9 of the Shipping Act of 1916 (39 Stat. 730, 46 U. S. C. 808) making unlawful, without the approval of the Commission, the chartering of any vessel owned by a citizen of the United States to any non-citizen.

[3] The House Committee on Merchant Marine and Fisheries conducted an investigation into the operations of the American Flag steamship companies under the so-called Red Sea

thorized and directed" the Chairman of the Maritime Commission, *inter alia*, *to* "renegotiate * * * any excessive profits" realized on contracts and subcontracts with the Maritime Commission, and to eliminate such profits by reducing the contract price, by withholding amounts other-

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Charters. On December 19, 1944, a subcommittee reported facts to the full committee (H. Rep. No. 2088, 78th Cong., 2d Sess.) which may be summarized as follows:

By a directive dated April 30, 1941, President Roosevelt ordered the Maritime Commission to assemble two million tons of merchant shipping to aid the democracies. As rapidly as ships could be made available they were loaded with British lend-lease supplies for Red Sea ports. Eighty-one vessels made a total of ninety voyages to the Red Sea area, under charter parties.

The terms of the charter parties and the charter hire were fixed by the Maritime Commission and accepted by the vessel owners in a series of meetings held with representatives of the Commission during late April and early May, 1941. The arrangement made by the Commission with the owners required that the Commission pay the charter hire from Lend-Lease funds and that the owners execute charter parties with the British Ministry of War Transport. Organization of schedules, spotting of cargo and loading berths, and correlation and direction of traffic were handled by the Commission. The charter hire for these voyages was $31,364,880.11, exclusive of demurrage and certain other charges. The voyage profits were $26,874,176.70, or over 80% of the charter hire. In all but one case, the profit per voyage, averaging $300,000, greatly exceeded the depreciated book value of the vessels although the average length of the voyage was only six months. The Committee concluded that the charter rates "were too high, and exceedingly so," and mentioned the possibility of compelling a refund of the excessive earnings of the steamship companies under the provisions of the Renegotiation Act.

wise due to the contractor, or by recovery from the contractor (Sec. 403 (c) (1) and (2); Pamphlet, pp. 6, 8–9). The Act also authorized the Chairman of the Maritime Commission, *inter alia*, to delegate, "in whole or in part," his "authority and discretion" thereunder. (Sec. 403 (f); Pamphlet, p. 5). Pursuant to that provision, the Chairman of the Commission delegated to the Price Adjustment Board of the Commission authority to review profits on war contracts for the purpose of reaching an agreement with the contractor as to the extent to which, if at all, such profits are excessive. In the absence of agreement with the contractor, the Board makes a recommendation to the Commission Chairman, who, if he finds that excessive profits have been realized, makes a determination as to their amount and takes steps for their elimination. (See Appendix, *infra*, pp. 66–75).

On November 26, 1943, petitioner John R. Paull, a member of the Maritime Commission Price Adjustment Board, wrote to the respondent stating that "renegotiation for your company has been assigned" to the Board, whose function is "to review the profits realized * * * under contracts * * * subject to renegotiation" under the Renegotiation Act and "to arrive at a settlement of the amount of excess profits, if any, realized under the Act by the contractor" (R. 21–22). The letter invited respondent to an

initial conference with the Board (set for December 13, 1943, but subject to continuance at respondent's request, R. 22), and requested that at such conference respondent supply certain information relating to its income and expenses during 1941 and 1942, divided between government and commercial business and showing separately operations under the Red Sea Charters (R. 22). The letter explained that at the conference respondent would be free to state reasons, if any, why it was unable to furnish the information requested or why it was not "subject to renegotiation" (R. 23). The letter concluded:

> It is anticipated that after this information has been analyzed by us * * * a mutually satisfactory determination can be made as to whether you have realized excessive profits, within the meaning of the Act.

On December 13, 1943, respondent replied to Mr. Paull, acknowledging that some of its other contracts with government agencies might be subject to renegotiation and suggesting a conference with respect to such contracts, but denying that the Red Sea Charters were subject to the Renegotiation Act because: (a) the charters were not entered into with any "Department" within the meaning of the Act, since they named the British Ministry of War Transport rather than the Maritime Commission; (b) final payment on the charters had been made prior to

April 28, 1942 (although it was recognized that certain demurrage claims against the Commission under the charters were still outstanding); and (c) renegotiation was begun more than one year after the close of respondent's fiscal year within which the charter operations were completed (R. 29–31).[4]

On May 23, 1944, Kenneth F. Clark, counsel for the Board,[5] wrote to respondent's counsel, expressing the opinion that "there was in each case [pertaining to the Red Sea operation] a contract between the vessel owner and the Maritime Commission to which the Renegotiation Act is applicable", and suggesting that a conference be held on June 29, 1944 "for the purpose of determining what portion of the profits of these companies is

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[4] The Act applies only to contracts with a "Department," including the Maritime Commission, on which final payment has not been made prior to April 28, 1942. Renegotiation must be started within "one year after the close of the fiscal year of the contractor * * * within which completion * * * of the contract * * * as determined by the [head of the agency] occurs." (See Pamphlet, pp. 11–12, 17–18.)

[5] Mr. Clark was not then a member of the Board. He was later appointed a member, and after this proceeding had reached the court below, he was made a party, upon motion of respondent (R. 39–42).

Mr. Clark, like others of the original petitioners in this Court, has left the Price Adjustment Board. It has also been announced that Admiral Land will resign on January 15, 1946. It is anticipated, therefore, that before the argument in this case, a motion will be made to dismiss some of the petitioners and substitute others where proper.

excessive within the meaning of the Act" (R. 6, 32). The letter stated that although for "technical reasons" the charters had been made with the British Ministry of War Transport, the Maritime Commission had conducted the negotiations with the vessel owners and had agreed to pay and had paid the charter hire to them; and that this arrangement "was evidenced by correspondence between the Commission and the vessel owner" which resulted in a "renegotiable agreement with the Commission" (R. 31–32).

Respondent did not reply to the letter or attend the conference on June 29, 1944. Instead, before any recommendation by the Board to the Chairman of the Commission, and before any decision by the Chairman on respondent's contentions, the latter filed its complaint on June 27, 1944, praying that petitioners, the Commission Chairman and the Board members, be enjoined from requiring respondent to furnish information, from enforcing the Renegotiation Act with respect to the Red Sea Charters, and from initiating criminal proceedings because of respondent's failure to supply information (R. 9–10). The complaint further prayed for a declaratory judgment that the Red Sea Charters are not subject to renegotiation, and that no information with respect thereto can lawfully be required of respondent (R. 10).

Petitioners moved to dismiss the complaint on the grounds that the court had no jurisdiction

over the subject matter, that the complaint failed to show any injury to respondent, and that respondent had not exhausted its administrative remedies (R. 37–38). The district court, pointing out that no administrative order had been issued, dismissed the complaint on the authority of *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (R. 38–39).[6] On appeal, the court below reversed, one judge dissenting, and remanded the case to the district court "for consideration of the single question" whether the Red Sea Charters were "contracts with a 'Department' within the meaning of § 403 of the Renegotiation Act of 1942" (R. 52). The district court was permitted, in its discretion, to maintain the *status quo* pending decision of the jurisdictional question, and to require respondent to file a bond insuring "payment to the United States of any amount ultimately found to be due" (R. 52).[7]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that the district court had jurisdiction in the circumstances of this case to determine by declaratory judgment whether the Red

[6] The Court also denied respondent's motion for a preliminary injunction (R. 35–39).

[7] As yet, respondent has not sought a temporary injunction in the district court.

Sea Charters were contracts with a "Department" within the meaning of the Renegotiation Act.

2. In holding that such jurisdiction, if it existed, should be exercised.

3. In holding that the motion to dismiss the complaint admitted that the Red Sea Charters were not subject to the Renegotiation Act.

4. In failing to hold that the action was premature in that respondent had not sustained and was in no imminent danger of sustaining any legal injury.

5. In failing to hold that respondent should have exhausted its administrative remedies before seeking judicial relief.

6. In ruling that the district court may, by injunction, maintain the *status quo* pending decision of the jurisdictional question.

7. In reversing the judgment of the district court.

SUMMARY OF ARGUMENT

I

Neither the injunctive nor the declaratory relief sought by respondent is available to it. This is so since there is no case or controversy within the meaning of Article III of the Constitution, the facts stated in the complaint are not sufficient to invoke the equitable jurisdiction of the federal district court, and because there is no "actual controversy" within the meaning of the Declara-

tory Judgment Act. The record shows nothing more than a disagreement between counsel for respondent and counsel for the Commission's Price Adjustment Board as to whether the Red Sea operations are subject to the Renegotiation Act. The Board itself has neither decided that the Act applies to such operations nor that excessive profits have been realized thereunder. Moreover, the Board's decisions would merely be advisory to the Commission Chairman who alone has authority to issue a final renegotiation order.

Respondent's fear of criminal prosecution for failure to supply information sought by the Board is groundless. While the Act imposes criminal penalties for "wilfully" failing to comply with a "demand" by the Chairman for financial information, the complaint clearly shows that no "demand" has either been made or threatened. Moreover a court will not interfere where a refusal to comply with such a demand is based on an honest belief that the Act is inapplicable since such a belief would go far toward showing that the refusal was not wilful. While a judicial decision at this stage may save respondent the expense and annoyance of administrative proceedings, that is not a ground for judicial relief.

II

The decision below disregards the "long settled rule of judicial administration" requiring the ex-

haustion of administrative remedies. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Respondent might secure full relief by resorting to the Board, the Chairman, and the Tax Court.

III

The exclusive jurisdiction of the Tax Court bars respondent's suit in the district court. Congress intended the Tax Court to be the sole forum for review of renegotiation proceedings, and that court's jurisdiction clearly extends to "coverage" questions. If this were not so, its power, described in the statute as the right to make a *de novo* redetermination of excessive profits, would be less plenary than that of the departments. The provision for finality of Tax Court decisions does not excuse disregard of that remedy. While the extent to which Tax Court decisions are reviewable is not before this court, Congress would seem to have the power to make such decisions final on an issue such as is here presented. But insofar as the respondent may constitutionally be entitled to judicial review following the Tax Court's decision, provision has, in effect, been made therefor by the separability clause in the Act. Cf. *Crowell* v. *Benson*, 285 U. S. 22, 62–63. In any event, regardless of finality, Congress intended that aggrieved persons should first apply to the Tax Court for relief, and that tribunal is

certainly capable of affording full relief to the respondent.

IV

The prayer for a declaratory judgment adds nothing to respondent's case. What is here sought is essentially the adjudication of an equitable cause of action, and the district court was "as free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds." *Great Lakes* v. *Huffman*, 319 U. S. 293, 300. Applying this principle, the district court could not interfere with the administrative proceedings by declaration at a stage where it could not have done so under its power to enjoin. A declaratory judgment is, as a practical matter, no less obstructive to incompleted administrative functions than an injunction, since the executive branch of the Government will observe the court's decision and suspend further proceedings not only in respect of the plaintiff but also as to all others similarly situated. At the very least, the district court did not abuse its discretion in denying relief.

V

Although petitioners are being sued in their individual capacities, they have no personal interest in the controversy and the action against them seeks to control the exercise of their functions as officers of the United States. The suit does not fall within any of the recognized categories ex-

cepted from the sovereign immunity doctrine, and respondent is merely seeking judicial intervention at an earlier stage of the same type of proceeding as was involved in *Mine Safety Appliance Company* v. *Forrestal*, No. 71, this Term, decided December 10, 1945, in which the suit was held to be barred as being an action against the United States to which it had not consented.

ARGUMENT

I

THERE IS NO JUSTICIABLE CONTROVERSY AND NO GROUND UPON WHICH TO INVOKE AN EXERCISE OF THE EQUITABLE JURISDICTION OF THE DISTRICT COURT

Respondent has failed to make out a case for the exercise of judicial power, since the record shows at most a disagreement between counsel for respondent and counsel for the Commission's Price Adjustment Board as to whether certain contracts are subject to the Renegotiation Act. Such a difference of opinion with a body whose authority is confined to making recommendations to the Chairman, and which is itself without power to issue a renegotiation order, cannot create a justiciable controversy.[*]

The same facts which serve to show that there is no case or controversy within the meaning of

[*] Cf. *Electric Bond & Share Company* v. *Securities and Exchange Commission*, 303 U. S. 419, 443, and cases cited; *Willing* v. *Chicago Auditorium Ass'n*, 277 U. S. 274.

Article III of the Constitution serve even more clearly to show that there is no sufficiently imminent or threatened legal injury to justify the exercise of the district court's equity jurisdiction. Cf. *Coffman* v. *Breeze Corporations*, 323 U. S. 316, 322. For this reason and for other reasons adverted to in points II and III of this brief, we think it clear that an injunction would be improper in this case.

The allegations of the complaint show that respondent has merely been requested, by letter of November 26, 1943, from the Board, to present certain information at an initial renegotiation conference, and has been notified, by letter of May 23, 1944, of the opinion of the Board's counsel that certain of respondent's contracts are renegotiable. These, the request and opinion, were thought by the court below to be sufficient to make out an "actual controversy" upon which the judicial power could operate (R. 49, n. 11; R. 44, n. 4 and 5). But the documents in question show on their face that no conclusion has been reached by the Board or the Chairman of the Commission as to whether any of the respondent's Red Sea Charters are subject to the Act. The "Notice of Initial Conference under the Renegotiation Act," requesting respondent to furnish the Board with certain information, explicitly stated that respondent would be "at liberty * * * to state reasons why you are not subject

to renegotiation" (R. 23). The letter of May 23, 1944 from the Board's counsel (R. 31–32) plainly expressed his opinion only, not that of the Board or the Chairman (see R. 54). It was manifestly intended to show that there was a reasonable basis for holding an initial renegotiation conference. Nothing in the letter altered the invitation to respondent contained in the original notice of November 26, 1943, "to state reasons why you are not subject to renegotiation" (R. 23).

In any event, Mr. Clark, the Board's counsel, could not speak for the Board, and the Board has not determined that these contracts are subject to the Act, or that any "excessive profits" have been realized under these or any other contracts of respondent. Even if the Board should ultimately decide both questions against respondent, such decision would merely be advisory to the Chairman of the Commission, who alone has authority to issue the final renegotiation order.[9]

[9] Furthermore, since respondent conceded that a part of its business is renegotiable, the letter, even though it might imply that in the opinion of the Board some of respondent's business was subject to renegotiation, carries no necessary implication as to Red Sea business.

[10] There is set forth in the Appendix, *infra*, pp. 66–68, a letter from the Board, attaching copies of the Administrative Orders establishing and defining the authority of the Board. The letter explains that in the case of a unilateral determination of "excessive" profits, it has been the Board's consistent practice, following its decision, to draft a "unilateral order", which, together with a memorandum of explanation

Thus, the allegation in the complaint (R. 7) that petitioners "intend to and will" make "a unilateral determination of alleged excess profits under the charter agreements" and "unlawfully withhold amounts due the [respondent] from the United States" are "not statements of fact at all but mere predictions." *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528, 530 (App. D. C.), certiorari denied, 323 U. S. 774.[11]

The same is true of the allegation (R. 7) that petitioners "intend to and will" unlawfully "re-

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and recommendation is transmitted to the Chairman of the Commission for his signature. If the recommendation is adopted, the order is issued as the order of the Commission Chairman and bears his signature only. The letter further states that the Board has never construed the administrative orders defining its authority as permitting it to issue a unilateral order itself, and that the Board has never issued such an order on its own authority.

[11] The opinions of the Commission and its Chairman, expressed in a letter to a Congressional subcommittee and in a statement to the vessel owners that the "Red Sea Charter" rates were excessive (Hearings before the Subcommittee on Charter Rates of the House Committee on Merchant Marine and Fisheries on H. Res. 52, 78th Cong., 1st Sess., pp. 10 and 13) represent their judgment upon the basis of material then available to them. It is not to be assumed that the Chairman will fail to make an independent determination of the question upon the record before the Board containing such materials and argument as respondent may choose to adduce. Moreover, it has been announced that Admiral Land will resign as Commission Chairman as of January 15, 1946, and there is no assurance that his successor will even share in Admiral Land's preliminary views.

quire" respondent to furnish the information specified in the letters of November 26, 1943, and May 23, 1944 (R. 21–24, 31–32), and that respondent "will be subjected to" the penal sanctions of the Act and incur "the expenditure of large sums of money in defense of criminal prosecutions" for failure to supply the information "demanded" (R. 9). Section 403 (c) of the Act (Pamphlet, p. 4) empowers the Chairman "to demand" financial statements, and imposes criminal penalties for "willfully" failing or refusing to comply, but the complaint does not allege any facts showing that the Chairman or the Board has, by order or otherwise, made or threatened to make any such "demand". The letters referred to above are obviously a "request" rather than a "demand", and it is inconceivable that without a formal and categorical demand under the statute, any criminal prosecution would be instituted for failure to comply. Moreover, even if the letters be deemed a "demand", a court of equity would not interfere to prevent a criminal prosecution to which the respondent could make the ready defense that his refusal to comply "is based on an honest belief that the Act is not applicable". *California* v. *Latimer*, 305 U. S. 255, 260–261; *Federal Power Commission* v. *Metropolitan Edison Co.*, 304 U. S. 375, 387. Even if the Chairman had sought the informa-

tion by administrative subpoena[12] and had instituted judicial proceedings for its enforcement, the respondent would not be entitled therein to an original judicial decision of the "coverage" question prior to the administrative hearing and determination. Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501. It cannot be that it is entitled to such a determination in this wholly collateral proceeding instituted before any "demand" has been made.

Since there is absent an actual or immediately threatened invasion of any of respondent's legal rights, there is no occasion for the exercise of the judicial power.[13] Such expense and annoyance as respondent may suffer in connection with renegotiation proceedings before the Board, is "part of the social burden of living under govern-

[12] Under Title XIII of the Second War Powers Act (56 Stat. 185), made applicable by Section 403 (d) of the Renegotiation Act, the Chairman may invoke the aid of Federal courts to compel obedience to subpoenas (see Pamphlet, p. 4).

[13] *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; *Employers Group etc.* v. *National War Labor Board*, 143 F. 2d 145 (App. D. C.), certiorari denied, 323 U. S. 738; *Eighth Regional War Labor Board* v. *Humble Oil & Refining Co.*, 145 F. 2d 462 (C. C. A. 5), certiorari denied, No. 1306, 1944 Term, June 18, 1945; *National War Labor Board* v. *United States Gypsum Co.*, 145 F. 2d 97 (App. D. C.), certiorari denied, 324 U. S. 856; cf. *Standard Computing Scale Co., Ltd.* v. *Farrell*, 249 U. S. 571, 574; *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. 2d 810, 814 (C. C. A. 2).

ment", and is not the sort of irreparable injury against which equity protects" *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 220–222; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52.

Shields v. *Utah Idaho Central R. Co.*, 305 U. S. 177; *Utah Fuel Co.* v. *Commissioner*, 306 U. S. 56, and *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U. S. 285, relied on by the court below (R. 51), are distinguishable. In the *Shields* case, the Mediation Board had already *ordered* the railroad to post certain notices pursuant to the Interstate Commerce Commission's determination that the railroad was not "interurban" (compare *supra*, pp. 18–20); in the *Utah Fuel* case, no other remedy was available to the complainants who sought to prevent the imminent disclosure of allegedly confidential information (compare, *infra*, pp. 22–54); and the *Great Northern Ry.* case was not a suit in equity at all but an action at law to recover "$80 alleged to have been exacted in violation of the carrier's tariff" (259 U. S. at 288).

For much the same reasons as those outlined above, respondent is not entitled to declaratory relief. The Declaratory Judgment Act, 28 U. S. C. 400, permits of relief only in "cases of actual controversy", and there is here presented no "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of

a declaratory judgment". *Maryland Casualty Co.* v. *Pacific Co.*, 312 U. S. 270, 273.[14] The Declaratory Judgment Act does not open the Federal courts to those who seek "to obtain an advisory decree" upon "hypothetical controversies which may never become real." *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 443; see also *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 324.[15]

II

RESPONDENT HAS FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES

If the recommendation of the Price Adjustment Board is adverse to respondent, and if the final determination of the Commission's Chairman

[14] See also *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 324–325; *Helco Products Co.* v. *McNutt*, 137 F. 2d 681 (App. D. C.); *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (App. D. C.), certiorari denied, 323 U. S. 774; *Smith* v. *American Asiatic Underwriters*, 127 F. 2d 754, 756–7 (C. C. A. 9).

[15] *Perkins* v. *Elg*, 307 U. S. 325, upon which the court below relied (R. 50–51), is not to the contrary for, on the issue of Elg's citizenship, upon which a declaratory judgment was sought, there had been a final administrative determination. Moreover, the State Department had refused to issue a passport to Elg, and after there had been a threat of deportation, its execution had been postponed by agreement of counsel, pending termination of the suit. In any event, special considerations were involved, in view of the citizenship issue. Cf. *Ng Fung Ho* v. *White*, 259 U. S. 276.

is likewise adverse, respondent will have an adequate remedy in the Tax Court of the United States under Section 403 (e) (2) of the Renegotiation Act, which provides (Pamphlet, pp. 38–39) that

> Any contractor * * * aggrieved by a determination * * * as to the existence of excessive profits * * * may * * * file a petition with The Tax Court of the United States for a redetermination thereof.[15a] Upon such filing such court shall have exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits * * * and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the [Chairman]. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the [Chairman], but shall be treated as a proceeding de novo.

In holding a declaratory judgment to be available although respondent has failed to resort for relief to the Board, the Chairman, or the Tax Court, the court below disregarded a "long settled rule of judicial administration" requiring that

[15a] The remaining portion of this quotation is taken from Section 403 (e) (1) and is incorporated by reference in Section 403 (e) (2). See Pamphlet, pp. 37–39.

the courts decline to intervene where the applicant has failed to exhaust the administrative remedies made available by Congress.[16]

The court below thought these remedies "not an adequate substitute" for a declaratory judgment in the federal courts because "as the result of the District Court's disclaimer of jurisdiction [respondent] would be subjected to an expensive inquisitorial investigation" (R. 49, 50). If that sufficed to support judicial intervention at the brink of a hearing, there would be little left of the rule as to exhaustion of remedies. That it does not suffice is clear from *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51–52, which rejected just such an argument as ground for interrupting the administrative process. See also *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209, 220–222.

The court below reasoned that its exercise of jurisdiction would not "improperly interfere with the statutory administrative plan" because (R. 49)—

> it would settle the jurisdictional question in the only forum in which it can be settled—

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[16] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 50; *California* v. *Latimer*, 305 U. S. 255; *Federal Power Commission* v. *Edison Co.*, 304 U. S. 375; *Petroleum Exploration, Inc.* v. *Public Service Commission*, 304 U. S. 209; *Newport News Company* v. *Schauffler*, 303 U. S. 54; *Natural Gas Pipeline Co.* v. *Slattery*, 302 U. S. 300; *Miles Laboratories* v. *Federal Trade Commission*, 140 F. 2d 683 (App. D. C.), certiorari denied, 322 U. S. 752; cf. *Levers* v. *Anderson*, No. 51, this Term, decided November 5, 1945.

> at least at this stage of the case. If decided favorably to [respondent], it would completely end the controversy. If decided adversely to [respondent], it would leave the Commission and, if need be, the Tax Court, free to consider the merits.

But a determination in the *Myers* case, and in every other case where an unsuccessful effort was made to obtain a judicial decision of a "jurisdictional" question before the administrative proceedings had terminated might have "completely" ended "the controversy". For instance, in the *Myers* case, a decision by the district courts, before the administrative hearing, as to whether the employer was subject to the National Labor Relations Act, would either have ended the controversy altogether or have left the Board free to continue its hearing as to the employer's alleged unfair labor practices. Yet this Court, relying on an impressive body of authority,[17] ruled that the employer must first exhaust its remedy before the Board, and then, if necessary, seek review in the appropriate circuit court of appeals, in accordance with the statutory plan for review. (303 U. S. at 48–51). The contention that questions of statutory coverage are not subject to the exhaustion rule was considered and squarely rejected in the *Myers* case, in which the Court, citing many authorities, declared (p. 51): "That

[17] See cases cited in 303 U. S. at 51, note 9.

rule has been repeatedly acted on in cases where, as here, the contention is made that the administrative body lacked power over the subject matter."

There are practical reasons for applying this principle here, apart from the obvious fact that the Board, the Chairman, or the Tax Court, might decide either that the Red Sea operations were not subject to the Act, or that they gave rise to no renegotiable profits. The question which the court below directed the district court to hear and decide (whether the Red Sea operations constituted "contracts with a 'Department' " within the meaning of the Act) was only one of three questions raised by respondent as objections to the application of the Act. That issue, far from being purely one of law as the court below supposed (R. 51), presents a mixed question of law and fact of considerable complexity, calling for an inquiry into the dealings and arrangements between the Commission and the respondent to determine whether, apart from the charter parties themselves, a renegotiable agreement arose between respondent and the Commission (see R. 31–32). The hearing and determination of this question by the Chairman of the Commission and later by the Tax Court in *de novo* proceedings may involve presentation and consideration of data that would be pertinent to the other two issues of "coverage" raised by respondent in the

court below—whether final payment under the contracts was made prior to April 28, 1942, and whether such payment had been completed in a fiscal year expiring more than one year prior to the commencement of renegotiation proceedings (R. 44–45). While conceding that the latter two may very well be matters "as to which Congress has committed the answer primarily to the Commission," the court below held the first question to be "jurisdictional and fundamental" and susceptible of resolution by declaratory judgment (R. 45). Such selection of one of several issues which an administrative agency would be required to consider in exercising its statutory functions, is contrary to sound precepts. Cf. *Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 507–508. Here, as in the cited case, the Commission, in order to perform its "function * * * must draw inferences and make findings from the same conflicting materials" that the court below considered in "anticipating and foreclosing" the administrative conclusion (*Endicott Johnson Corp.* v. *Perkins*, 317 U. S. 501, 509).[18]

[18] In the *Endicott Johnson* case, *supra*, the Secretary of Labor had applied to a federal district court for enforcement of a *subpoena duces tecum*, issued by the Secretary in pursuance of an investigation of alleged violations of the Walsh-Healey Public Contracts Act. The subpoena called for payroll and similar records relating to plants of the contractor other than those specified in the contract in question. Despite the defendant's contention that the Act did not cover

Implicit in the decision below is the assumption that little can be said to support the proposition that the Renegotiation Act authorizes the recapture of any excessive profits realized from the Red Sea operations (R. 47–49). In view of the limited record before the court that conclusion was, to say the least, hasty.[19] Moreover, the charters aside, these profits may be subject to recapture because they were realized under contracts embodied in correspondence, which were themselves subject to renegotiation. See *supra*, p. 9. Thus, the question assigned for litigation may, when a full record is developed, prove to be entirely academic. Extensive litigation to obtain a declaratory judgment as to whether the Red Sea charters are subject to renegotiation can accomplish little if in fact other contracts subject to renegotiation underly the charters.

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such plants, this Court held that the district court was under a duty to enforce the subpoena, and was without jurisdiction "to decide the question of coverage itself." (317 U. S. at 509.)

[19] The House subcommittee pointed out facts which might well sustain a contrary conclusion, such as that the Red Sea operation was sponsored, organized, controlled and paid for not by the British Ministry of War Transport but by the United States Maritime Commission, a "Department" named in the Renegotiation Act. H. Rep. No. 2088, 78th Cong., 2d Sess., *supra*, pp. 4–5, note 3. That the charter parties were executed by the British Ministry of War Transport rather than by the Commission may conceivably be little more than a formality, not affecting the substance of the transactions.

III

THE EXCLUSIVE JURISDICTION OF THE TAX COURT TO REDETERMINE RENEGOTIATIONS BARS RESPONDENT'S SUIT IN THE DISTRICT COURT

The court below thought exhaustion of the remedies available in the Commission and in the Tax Court was excused here because before neither body was there an "opportunity * * * for an adequate determination of the jurisdictional question." (R. 51). The court failed to explain why an issue in controversy between respondent's counsel and the Board's counsel could not likewise have been submitted to the Board and the Chairman, either of whom could conceivably have ended the dispute without litigation. That the departmental authorities must of necessity pass upon coverage issues is too clear for argument, since before any computation can be made of profits, excessive or not, the contracts and the business subject to renegotiation must initially be determined and segregated by the renegotiators. By parity of reasoning, the *de novo* proceeding in the Tax Court, after a final order has been issued, must likewise extend to such preliminary questions.

A. *Congress intended the Tax Court to be the sole forum for review of renegotiation proceedings.*—The Tax Court remedy was added to the Renegotiation Act almost two years after its original enactment. The House Ways and Means

Committee, in reporting the bill which provided this remedy, repeatedly emphasized the "exclusive" jurisdiction which the Tax Court would have in redetermining the amount of excess profits. (H. Rep. No. 871, 78th Cong., 1st Sess., pp. 76–77, 84–85.) In the House, Congressman Disney, a member of the Committee and a sponsor of the provision, justified it as follows (89 Cong. Rec. 9929):

> The Tax Court was chosen to perform this function for four principal reasons. The first is, that the Tax Court deals with very similar problems under the excess profits tax. The second * * * is the fact that [its] judges hold court all over the United States and hence the contractors will not have to come to Washington to be heard by the court. The third is that the use of one forum will bring about uniformity in the development and application of principles of decision; and the fourth is that a forum had to be chosen upon which Congress could impose the duty of deciding the nonjudicial question as to the amount of excessive profits * * *.

After the House passed this provision, the Senate Finance Committee and the Senate, while agreeing that one forum should be given "exclusive" jurisdiction to make a *de novo* review of renegotiation determinations, substituted the Court of Claims for the Tax Court to perform this function (S. Rep. No. 627, 78th Cong., 1st Sess.,

pp. 34, 110; 90 Cong. Rec. 534). The conferees reinstated the Tax Court (H. Rep. No. 1079, 78th Cong., 2d Sess., p. 84), and the Senate accepted the Conference Report (90 Cong. Rec. 1301). In the House, Congressman Disney pointed out that under both the House and Senate versions, the review of renegotiation determinations (90 Cong. Rec. 1355)

> is required to be treated as a de novo proceeding in which *all questions of fact and law* may be decided. The conference report makes no change in this regard * * *. [Italics supplied]

Congressman Izac, a member of the conference committee from the House, also commented upon the provisions for "court review", saying (*id.* 1357):

> We of the Naval Affairs Committee suggested that they have recourse to the district courts of the land, but disregarding our recommendations it was decided to put it first in the Claims Court, and finally in The Tax Court.[29]

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[29] The House Committee on Naval Affairs, reporting on the "Renegotiation of War Contracts", had earlier recommended "that the Renegotiation Act be amended so as to provide that, whenever one of the Secretaries has made a unilateral determination, the contractor concerned may obtain judicial review of that determination in the United States District Court in the district in which the contractor maintains its principal place of business, within 60 days after the publication of the unilateral determination." H. Rep. No. 733, 78th Cong., 1st Sess., p. 34.

The conference bill was accepted by the House (*id.* 1359) and became law.

This material plainly shows that Congress considered and expressly rejected review by the district courts of renegotiation determinations, and instead provided for a *de novo* hearing by a single expert tribunal, the Tax Court, in order to "bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929), giving that tribunal "exclusive" jurisdiction extending to "all questions of fact and law" (90 Cong. Rec. 1355).[21]

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[21] The provision that an aggrieved contractor "may" file, rather than "shall" file a petition in the Tax Court, does not make the Tax Court remedy an "option" or "privilege" which the contractor is free to accept or reject. Obviously, Congress used the permissive "may" because it did not wish to require a contractor to seek review; "the alternative afforded by the use of the word 'may' is between seeking relief or submitting" to the Chairman's determination. *Lewis* v. *City of Lockport*, 276 N. Y. 336, 344, 12 N. E. 2d 431, 434. Such is the unquestioned practice under the tax laws which provide that a taxpayer "may" file a petition in the Tax Court for a redetermination of a tax deficiency; and this provision of the taxing statutes is essentially the model for the Tax Court remedy in the Renegotiation Act. See *infra*, pp. 34–36. This Court has uniformly held that statutory remedies, no less permissive in form, must be exhausted before judicial review is sought. *Pittsburgh &c. Ry.* v. *Board of Public Works*, 172 U. S. 32, 44–45; *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210, 229–230; *First National Bank* v. *Weld County*, 264 U. S. 450, 453–455; *Gorham Manufacturing Co.* v. *State Tax Commission*, 266 U. S. 265, 269–270; *Porter* v. *Investors Syndicate*, 286 U. S. 461, 468; *Petersen Baking Co.* v. *Bryan*, 290 U. S. 570, 575–576; *United States* v. *Illinois Central R. Co.*, 291 U. S. 457, 463.

B. *The jurisdiction of the Tax Court extends to "coverage" questions.*—Conceding that Congress "may very well" have committed "primarily to the Commission" the issues whether lapse of time since final payment or completion of the contracts bars renegotiation (R. 45), the court below thought that the issue whether there were contracts with the Commission is "jurisdictional and fundamental", and, therefore, that respondent is entitled to invoke the Declaratory Judgment Act even before the administrative proceedings have been completed (R. 45). This decision, drastically narrowing the province of the Tax Court, squarely conflicts with the legislative intention and would seriously undermine the exclusive statutory review plan outlined above (pp. 23, 29–32). Respondent seeks to draw support for this restriction from the grant to the Tax Court, in Section 403 (c) (Pamphlet, p. 37), of the power to redetermine the "amount", if any, of excessive profits. It urges that the Tax Court's inquiry is to be con-

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The provision that the Tax Court shall have exclusive jurisdiction "Upon such filing" is similar to that used in many statutes whose effect is to create exclusive jurisdiction. See, *e. g.*, Fair Labor Standards Act, 52 Stat. 1065, 29 U. S. C. 210; Securities and Exchange Act, 48 Stat. 901, 15 U. S. C. 78y (a); Holding Company Act, 49 Stat. 834, 15 U. S. C. 79x; Natural Gas Act, 52 Stat. 831, 15 U. S. C. 717r (b); Federal Power Act, 49 Stat. 860, 16 U. S. C. 825l (b); Food, Drug and Cosmetic Act, 52 Stat. 1052, 21 U. S. C. 355 (h); Civil Aeronautics Act, 52 Stat. 1024, 49 U. S. C. 646 (d); Federal Alcohol Administration Act, 49 Stat. 978, 27 U. S. C. 204 (h).

fined to a reexamination of the "excessiveness" of the profits under the contracts covered by the renegotiation order, without reexamining whether such contracts are subject to the Act.

1. It is obvious, from a comparison of the Renegotiation Act with the Internal Revenue Code, that the Tax Court remedy was drafted with the Internal Revenue Code as a model. The authority of the Tax Court to "redetermine" the "amount" of excessive profits is the counterpart of that Court's authority under the taxing statutes to "redetermine" the "amount" of a tax deficiency (compare Sec. 403 (e) of the Renegotiation Act (Pamphlet, pp. 37–39) with Internal Revenue Code, Sections 271 and 272).[22] And under the Internal Revenue Code, the jurisdiction of the

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[22] The Internal Revenue Code provides, in part (26 U. S. C.):

§ 271. *Definition of deficiency.*

As used in this chapter in respect of a tax imposed by this chapter "deficiency" means—

(a) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the taxpayer upon his return; * * *

§ 272. *Procedure in general—(a) (1) Petition to Board of Tax Appeals.*

If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax

Section 403 (e) (1) of the Renegotiation Act provides, in part:

Any contractor or subcontractor aggrieved by an order of the Board determining the amount of excessive profits received or accrued by such contractor or subcontractor may, within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the last day) after the mailing of the notice of such order under subsection (c) (1), file a petition with The Tax Court of the United States for a redetermination thereof. Upon such filing such court shall have exclusive jurisdiction, by order, to finally de-

Tax Court to consider "coverage" questions is, and was at the time of the adoption of Section 403 (c) of the Renegotiation Act, beyond question.[23] Indeed, the Tax Court even considers

imposed by this chapter, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

(b) *Collection of deficiency found by Board.*

If the taxpayer files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board which has become final shall be assessed and shall be paid upon notice and demand from the collector. * * *

* * * * *

(c) *Increase of deficiency after notice mailed.*

The Board shall have jurisdiction to redetermine the correct amount of the deficiency even if the amount so redetermined is greater than the amount of the deficiency, * * *.

termine the amount, if any, of such excessive profits received or accrued by the contractor or subcontractor, and such determination shall not be reviewed or redetermined by any court or agency. The court may determine as the amount of excessive profits an amount either less than, equal to, or greater than that determined by the Board. A proceeding before the Tax Court to finally determine the amount, if any, of excessive profits shall not be treated as a proceeding to review the determination of the Board, but shall be treated as a proceeding de novo.

* * * * *

[23] See, for example the following cases in which the Tax Court's authority to decide "coverage" questions was assumed: *Blair* v. *Oesterlein Co.*, 275 U. S. 220 (appli-

and decides constitutional questions arising under the tax laws.[24] We submit that the established authority of the Tax Court under the tax laws to consider all questions of law, including "coverage" issues, when redetermining the "amount" of a tax deficiency is "highly relevant and material evidence of the probable general understanding of the times and of the opinion of men who probably were active in the drafting" of the similar provisions in the Renegotiation Act. Cf. *Better Business Bureau of Washington, D. C., Inc.* v. *United States*, No. 52, this Term, decided November 13, 1945, slip opinion, p. 6.

2. To deny to the Tax Court jurisdiction over "coverage" questions would squarely conflict with several important provisions of Section 403 (e). That Section expressly provides that a Tax Court

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cability of special assessment provisions of Revenue Act of 1918); *Dobson* v. *Commissioner*, 320 U. S. 489 (whether particular recovery by taxpayer was income or a return on capital); *Helvering* v. *Clifford*, 309 U. S. 331 (whether income under a trust was taxable to the settlor); *Underwriters' Laboratories* v. *Commissioner*, 135 F. 2d 371 (C. C. A. 7), certiorari denied, 320 U. S. 756 (whether respondent was a charitable, scientific or educational organization or a business league exempt from corporate and excess profits tax); *Commissioner* v. *Aluminum Company of America*, 142 F. 2d 663 (C. C. A. 3), certiorari denied, 323 U. S. 728 (applicability of the Vinson Act, 48 Stat. 503, 34 U. S. C. 496, to certain contracts).

[24] See *Dobson* v. *Commissioner*, 320 U. S. 489, 502; Mertens, *Law of Federal Income Taxation*, Section 50.21; Hamel, *Practice and Evidence Before the United States Board of Tax Appeals*, p. 78.

proceeding "shall be treated as a proceeding *de novo.*" The normal understanding of a *de novo* proceeding is one in which the entire case is re-examined; and this is the manner in which the Tax Court has traditionally operated in reviewing tax deficiencies. Since the departmental officers entrusted with renegotiation must of necessity make a selection and determination of the contracts subject to renegotiation under the Act before they can proceed to compute the profits thereunder and make a judgment as to their excessiveness, the Tax Court in its *de novo* consideration of the matter must likewise examine into that preliminary issue. Otherwise, the proceedings in the Tax Court would become "*de novo*" only in part, the decision of the agency on the important jurisdictional question being final before the Tax Court. It is not to be supposed, in the absence of clear statutory language compelling the result, that Congress intended to entrust to the Tax Court only part of the renegotiation functions performed at the lower administrative level. The contrary intention is revealed by the statement of Congressman Disney on the floor of the House, that the Tax Court provision calls for a "de novo proceeding in which all questions of fact and law may be decided" (90 Cong. Rec. 1355). This is the only sensible construction of a *de novo* proceeding, which is in effect a new renegotiation of war contracts and

which must therefore involve the same initial steps of consideration and selection of contracts subject to the Act as took place in the prior renegotiation.

Congress has given additional evidence of its intention to provide complete review in the Tax Court by authorizing that court to determine as the amount of excessive profits "an amount either less than, equal to, or greater than" that specified in the renegotiation order. This authorization would be partially nullified by respondent's reading of Section 403 (e), for it would preclude the Tax Court from increasing the amount of excessive profits through a finding that such profits had been realized under contracts which the departmental authorities had held not to be subject to renegotiation; and conversely, from decreasing the determination through a finding that contracts had been erroneously included by the agency.[25]

3. Respondent's view of the Tax Court's function would, as a practical matter, play havoc with the statutory scheme of redetermination. "Coverage" questions are constantly arising in the day to day administration of the Renegotiation Act, which is replete with exceptions and exemptions

[25] Contrary to respondent's contention (Br. in Opp., p. 29, n. 25), the elimination of the requirement that the Tax Court make findings of a fact in renegotiation cases, has no bearing upon the authority of the Court to consider "coverage" issues. Since Congress expressly provided that the Tax Court's determination was not to be judicially reviewed (see discussion, *infra*, pp. 43–54), findings of fact would serve no purpose.

affecting the "jurisdiction" of the renegotiation authorities. See *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations under the Renegotiation Act* (March 31, 1943) pp. 9–10; see also Pamphlet, pp. 11–12, 13–14, 16–18. As noted in the petition for a writ of certiorari in this case (p. 11), of some 200 renegotiation cases then pending in the Tax Court, approximately 130 (about 65 percent) raised an issue of coverage.[26] If the district courts are permitted to resolve "coverage" issues at the outset of renegotiation proceedings, even before the administrator or the Tax Court has had an opportunity to form a judgment on that question, 65 percent of the cases pending in the Tax Court might be transferred to the district courts for determination of the "coverage" questions. This would frustrate the Congressional scheme for centralized review in the Tax Court and render impossible the uniformity of decision which Congress clearly sought to ensure (see *supra*, pp. 29–32). Moreover, it would tend substantially to defeat the Congressional purpose to assure speedy renegotiation.[27]

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[26] Of these, some 110 cases (or about 55 percent of the total) raised issues of coverage other than those which the court below indicated (R. 45) might not be the subject of declaratory relief.

[27] This purpose is manifest not only in the statutory plan for review, but in other provisions of the Act, *e. g.*, Section 403 (c) (6) requiring renegotiation to commence within one

Any reading of Section 403 (c) which would exclude "coverage" questions from the Tax Court's conceded jurisdiction over the "amount" of excessive profits ignores the essential nature of a determination that profits under certain war contracts are "excessive." To determine whether a company's profits are excessive, there must be, as we have pointed out, a segregation of renegotiable from nonrenegotiable business. The renegotiation authorities may decide that, of the company's five contracts under scrutiny, two, upon which losses were sustained, are not covered by the Act. Had these two been covered, they might balance out against the profits realized on the other three contracts, and thereby preclude any finding of excessive profits. See *Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission—Purposes, Principles, Policies, and Interpretations under the Renegotiation Act* (March 31, 1943) p. 7. It is therefore wholly unrealistic to suggest that the Tax Court is to confine its inquiry in such a case to whether the profits on the three contracts selected were excessive; the Tax Court must also look to see whether the two unprofitable contracts

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year after the close of the fiscal year of the contractor within which completion or termination of the contract occurs; Section 403 (c) (3) requiring that renegotiation orders issue within one year following the commencement of the renegotiation proceeding; and Section 403 (e) (1) providing that the filing of a petition in the Tax Court "shall not operate to stay execution" of the renegotiation order.

are covered before it can make any sensible determination that the company realized "excessive" profits on its war contracts as a whole for the given fiscal year. All of the foregoing considerations, we submit, make it clear that in using the word "amount" of excessive profits, Congress could not have intended to exclude "coverage" questions from the jurisdiction of the Tax Court.[28]

The renegotiation proceeding with respect to a war contractor normally extends to all of its contractual operations for a particular fiscal

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[28] Respondent has argued (Br. in Opp. pp. 31–32) that since Section 403 (e) in terms only permits aggrieved "contractors" to file Tax Court petitions, no Tax Court remedy is available to respondent unless respondent concedes that it is a "contractor" insofar as the Red Sea Charters are concerned. This contention hardly merits serious consideration. Since respondent appears to agree that certain of its contracts other than the Red Sea Charters are subject to the Act (R. 30), its standing in the Tax Court would seem assured. Moreover, to exclude persons such as respondent from the Tax Court would run counter to the efforts of Congress to funnel review of renegotiation proceedings into the Tax Court (see discussion, *supra*, pp. 29–32). Under comparable provisions providing for redetermination of tax deficiencies by the Tax Court, the language permitting any "taxpayer" to petition for Tax Court review unquestionably allows such a petition by a person claiming to be completely exempt from the taxing statute involved. See, *e. g., Underwriters' Laboratories* v. *Commissioner*, 135 F. 2d 371 (C. C. A. 7), certiorari denied, 320 U. S. 756. The decision in *In re Fassett*, 142 U. S. 479, upon which respondent relies (Br. in Opp. pp. 29–31), turned upon the particular language and scheme for review provided by the Customs Administrative Act, and the Court's opinion did not enunciate any principles applicable here.

period.[29] If the district courts and, on appeal, the circuit courts of appeals and this Court, are permitted to resolve coverage questions with respect to some of the company's contracts at the outset of the renegotiation proceeding, the ensuing delay would affect not merely the contracts giving rise to the particular controversy, but all the contracts involved in that renegotiation proceeding.

A segregation of contracts with the "Departments" and related subcontracts from ordinary commercial business is one of the most difficult and fundamental of the renegotiation problems. The number of contracts, purchase orders and supply contracts entered into each year by any significant producer of war material is numbered in the tens of thousands, and the segregation of renegotiable from nonrenegotiable business must be accomplished by the use of recognized accounting techniques. To hold that the Tax Court has no power to determine whether contracts are subject to renegotiation would, as a practical matter, eliminate the Tax Court from renegotiation and cast upon the Federal courts the well-nigh impossible task of examining in detail many thousands of supply contracts and subcontracts executed in connection with the war program. Most Tax Court proceedings would have to be

[29] See Blough, *Renegotiation Standards and Practices* (1943), *10 Law and Contemporary Problems*, pp. 276, 277.

postponed to await the determination, in extensive litigation in the federal courts, of which of the many thousands of contracts of each supplier are contracts with a Department or related subcontracts. And, as the dissenting judge below noted, "it is naive to think that this device [the declaratory judgment suit] would not be used for purposes of delay" (R. 68).

C. *The provision for finality of Tax Court decisions does not excuse disregard of that remedy.*—Vesting in the Tax Court "exclusive jurisdiction * * * to finally determine the amount, if any, of such excessive profits", Congress explicitly announced that "such determination shall not be reviewed or redetermined by any court or agency" (Sec. 403 (e), Pamphlet, p. 37). Respondent relies upon that provision as justifying disregard of the Tax Court and resort to the district court (Br. in Opp., pp. 36–37), but this position is untenable.

1. Whether a decision by the Tax Court is judicially reviewable, and what issue, if any, would be foreclosed by its judgment, is not before this Court or pertinent to a consideration of the instant case. The Tax Court has not been asked by respondent to decide and has not decided any aspect of the controversy at hand. The extent to which a judgment of that court can or should be judicially reexamined, despite the statutory language, is not a matter to be decided in the at-

stract, before a record is made in the Tax Court, and before it is known what issues the Tax Court has been asked to decide, what issues it has decided, and what issues the contractor seeks to have reviewed in another forum. For whatever the finality of a Tax Court decision, it is plain that Congress intended that persons aggrieved by renegotiation orders should at least seek initial relief in the Tax Court, and not in the district courts.

Since respondent might receive in the Tax Court all the relief it claims, nonreviewability of that body's determination does not excuse a failure to invoke its jurisdiction. In *First National Bank* v. *Weld County,* 264 U. S. 450, this Court held that a taxpayer's suit to recover taxes paid under protest was not maintainable in a district court where the plaintiff had failed to avail itself of an administrative remedy afforded by state law. Rejecting the contention that resort to that remedy was excused because "no appeal to a judicial tribunal was provided" from the administrative decision, Mr. Justice Sutherland, speaking for a unanimous Court, said that it could not "assume that if application had been made to the Commission proper relief would not have been accorded by that body" (264 U. S. 454–455). So here, the *de novo* determination which the Tax Court is directed to make would render wholly immaterial errors of judgment, in fact or law,

committed during the proceedings before the Chairman. "It is not to be assumed" that if respondent were to apply to the Tax Court, following the issuance of a unilateral renegotiation order, it would be denied "any right to which it is entitled." Cf. *Bourjois, Inc.* v. *Chapman*, 301 U. S. 183; 188.

2. If the reviewability of Tax Court decisions need be considered here, we maintain that in providing finality for Tax Court decisions, Congress did not exceed its lawful powers.

This Court has sustained a statute which left very similar questions of excessive profits to the final decision of the Board of Tax Appeals, now the Tax Court. The Revenue Act of 1918 (Sec. 328, 40 Stat. 1057) provided for a special computation of excess profits taxes by the Commissioner of Internal Revenue upon a finding by him that the ordinary computation, owing to abnormal conditions, would work exceptional hardship on the taxpayer. Under the special computation, the tax was the amount bearing the same ratio to the net income of the taxpayer as "the average tax of representative corporations engaged in a like or similar trade or business" bore to the taxpayer's average net income for the year in question. This Court held that the Board of Tax Appeals had jurisdiction to review the Commissioner's action under this provision (*Blair* v. *Oesterlein Co.*, 275 U. S. 220), but thereafter held that Congress did not intend tax-

payers to have any court review of (1) the action of the Commissioner in denying a claim for special computation, or (2) his determination as to the rate of tax to be applied in the event of the allowance of a claim for special computation. *Heiner* v. *Diamond Alkali Co.*, 288 U. S. 502; *Williamsport Co.* v. *United States*, 277 U. S. 551. In the latter case, it was held that the Court of Claims was without jurisdiction of a suit to recover excess profits taxes assessed and alleged to have been illegally collected under the Revenue Act of 1918, and that the determination of the Commissioner and the Board of Tax Appeals on this issue was final. Observing that the "considerations" which demanded special assessment under the Act were "facts concerning the situation of a large group of taxpayers which can only be known to an official or a body having wide experience in such matters and ready access to the means of information", Mr. Justice Brandeis said (277 U. S. at 561–562):

> Moreover, whatever jurisdiction is possessed by the Court of Claims to review determinations under §§ 327 and 328, would be possessed also by the district courts in suits against collectors and in actions against the United States, under § 24 (20) of the Judicial Code. Thus the determinations of the Commissioner in this delicate and complex phase of revenue administration would be subjected to review

> by a large number of courts, none of which have ready access to the information necessary to enable them to arrive at a proper conclusion in revising his decisions; whose experience in passing upon questions of this character would be limited; and whose varying decisions would tend to defeat, rather than promote, that equality in the application of the revenue law which §§ 327 and 328 were designed to insure. We conclude that the determination whether the taxpayer is entitled to the special assessment was confided by Congress to the Commissioner, and could not, under the Revenue Act of 1918, be challenged in the courts—at least in the absence of fraud or other irregularities.

These reasons apply with equal force to determinations made by the Tax Court in connection with renegotiation. Congress chose the Tax Court to perform that function because it "deals with very similar problems under the excess profits tax" and because "the use of one forum will bring about uniformity in the development and application of principles of decision" (89 Cong. Rec. 9929). Here, as under the Revenue Act of 1918, a proper determination in a "delicate and complex phase" of administration requires the exercise of expert judgment in the light of accounting practice, industry statistics, and profits allowed or voluntarily accepted under comparable circumstances. The typical renegotiation case requires

that due consideration be given to such matters as costs, profits, losses, contingent liabilities, operating efficiency, price policies, war financing, taxes, plant conversion, peacetime earnings, depreciation, amortization, working capital and other concepts familiar to those who administer or adjudicate the revenue law.[30] Because it considered the Tax Court to be "peculiarly fitted to determine what is fair price and what is fair profit, having long been engaged in the determination of similar questions and being thoroughly equipped for this purpose," Congress conferred upon it exclusive and final powers of decision. H. Rep. No. 871, 78th Cong., 1st Sess., p. 77.

Certainly there is no basis for respondent's contention (Br. in Opp. pp. 36–37) that Tax Court review of excessive profits under the Renegotiation Act is "incapable of affording due process".[31] Cf. *Yakus* v. *United States*, 321 U. S. 414, 435.

[30] See, *e. g.*, Sec. 403 (c) (3) of the Act (Pamphlet, p. 10) which requires that "In determining the excessiveness of profits realized or likely to be realized from any contract or subcontract, the Secretary shall recognize the properly applicable exclusions and deductions of the character which the contractor or subcontractor is allowed under Chapter 1 and Chapter 2E of the Internal Revenue Code."

[31] In urging that the Tax Court does not afford it an adequate avenue of relief from an excess profits determination by the Chairman, respondent argues that if money is erroneously withheld and covered into the Treasury of the United States, respondent will be unable to secure a refund, and will be denied interest on the amount erroneously withheld (Br.

in the Tax Court (Pamphlet, pp. 37–39) is not to be "treated as a proceeding to review" the renegotiation order of the Secretary but "as a proceeding de novo", *i. e.*, without prejudice to the contractor on account of prior determinations of excessive profits within the department. This proceeding would be had in a forum which, in the words of this Court, "has established a tradition of freedom from bias and pressures," whose "procedures assure fair hearings" and whose "deliberations are evidenced by careful opinions". *Dobson* v. *Commissioner*, 320 U. S. 489, 498. These safeguards render of little moment the technical classification of the Tax Court with quasi-judicial agencies in the executive branch rather than with a judicial tribunal like the Court of Claims. As this Court observed in *Switch-*

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in Opp. pp. 39–42). Such contentions are unsound, for the provision for Tax Court redetermination obviously contemplates a refund of any amount by which the excess profits determination is reduced by the Tax Court. Furthermore, Congress has made an appropriation explicitly available for refunds of "any amount finally adjudged or determined to have been erroneously collected by the United States pursuant to a unilateral determination of excessive profits, with such interest thereon (at a rate not to exceed 4 per centum per annum) as may be adjudged or determined to be owing in law or equity * * *". (Pub. L. No. 40, 79th Cong., 1st Sess., approved April 25, 1945). This removes all possibility of injury to an aggrieved contractor who applies to the Tax Court for a redetermination of his excess profits. Cf. *Stratton* v. *St. L. S. W. Ry.*, 284 U. S. 530; *Singer Sewing Machine Co.* v. *Benedict*, 229 U. S. 481; *Arkansas Building Association* v. *Madden*, 175 U. S. 269.

men's Union v. *National Mediation Board*, 320 U. S. 297, 303:

> Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. And where no judicial review was provided by Congress this Court has often refused to furnish one even where questions of law might be involved. See *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *United States* v. *George S. Bush & Co.*, 310 U. S. 371; *Work* v. *Rives*, 267 U. S. 175; *United States* v. *Babcock* [250 U. S. 328].[32]

3. Insofar as respondent may constitutionally be entitled to judicial review of the issue of coverage or any other issue after its decision by the Tax Court, the Act permits it. The finality and nonreviewability of the Tax Court's determination (Sec. 403 (e) (1)), we believe, extends to the coverage question here involved. But if such a construction of the statute would deprive respondent of any rights or privileges under the Fifth Amendment, by denying it judicial review of an issue which Congress cannot validly exclude from the courts, then to that extent the provision for finality does not apply. This is so because, as is true of all other statutory language, the Tax Court provisions must be read together with the Constitution, and any exceptions and qualifications re-

[32] See also *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; cf. *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536; *Reetz* v. *Michigan*, 188 U. S. 505, 507.

quired by the Constitution must be read into the statute if its language and the Congressional intention do not forbid it. Here, Congress has expressly taken care of this contingency by adding a separability clause to the Renegotiation Act (Sec. 403 (g); Pamphlet, p. 39), which in effect announces that the Tax Court determination shall be final and unreviewable only to the extent that the Constitution permits it. Cf. *Crowell* v. *Benson*, 285 U. S. 22, 62–63; *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 169–170. Read in this context, the Tax Court provisions of the Act leave a person aggrieved by a renegotiation determination with such access to such judicial relief, available under the general jurisdiction of the courts, as the Constitution requires. And the constitutional right of judicial review, whatever it may be, is not waived by proceeding in the Tax Court, but can be invoked in the appropriate court upon completion of the Tax Court proceeding. Cf. *St. Louis &c. R. Co.* v. *Public Comm'n*, 279 U. S. 560; *Lawrence* v. *St. L.–S. F. Ry.*, 274 U. S. 588; see also *Lockerty* v. *Phillips*, 319 U. S. 182, 188.

The enforcement machinery provided by the Act affords adequate opportunity for judicial review of issues constitutionally protected against administrative finality. A final renegotiation determination as to excessive profits may be enforced only by the methods authorized in the Act: (1) reduction in contract price, (2) withholding

amounts otherwise due, (3) directing another contractor to withhold amounts otherwise due, or (4) suit to recover (Section 403 (c) (2), Pamphlet, p. 9). If the Government utilizes the first or second methods of enforcement, the contractor, after he has established the right to apply to a court by exhausting his administrative remedies (see *supra*, pp. 22–28), may, if the Constitution requires an additional remedy in court, sue the United States for the amounts otherwise due under the contracts, and when the United States asserts the renegotiation orders as the justification for the reduction or withholding, the contractor may obtain a judicial decision as to any appropriate issue, such as the validity of the Act. If the Government directs a prime contractor to withhold sums otherwise due to a subcontractor (the renegotiated company), the latter may obtain the same type of judicial decision in a suit at law against the prime contractor, in which the defendant would be obliged to plead as a defense the renegotiation order and the Government's directions to withhold monies from the plaintiff. If the Government should bring an affirmative suit to recover under the renegotiation order, the de-

[33] Cf. *Coffman* v. *Breeze Corporations, Inc.*, 323 U. S. 316, 322–323; *Coffman* v. *Federal Laboratories, Inc.*, 323 U. S. 325, 326–327.

Where, in such a suit, an issue as to the constitutionality of the Act arises, the United States would unquestionably be certified to intervene as a party pursuant to the Act of August 24, 1937, 50 Stat. 751, 28 U. S. C. 401.

fendant may likewise obtain a judicial decision as to any appropriate issue, such as the validity of the Act. It is significant that before the Tax Court remedy was afforded by the Revenue Act of 1943, Congress recognized that the forum available for appropriate judicial action would depend on the method chosen by the Government to enforce determinations of excessive profits.[24] Since there "is no constitutional requirement that [the] test" as to the vindication of constitutional rights "be made in one tribunal rather than in another, so long as there is an opportunity to be heard and for judicial review which satisfies the demands of due process" (*Yakus* v. *United States*, 321 U. S. 414, 444), the system of Tax Court redetermination plus judicial review in a further proceeding to the extent constitutionally required is entirely valid.

Respondent's reliance (Br. in Opp. p. 26) on *Stark* v. *Wickard*, 321 U. S. 288, is misplaced. In that case this Court held that milk producers had standing to enjoin the Secretary of Agriculture from carrying out certain provisions of a milk order allegedly unauthorized under the Agricultural Marketing Agreement Act of 1937, which

[24] In the 78th Cong., 1st Sess.: Investigation of the Progress of the War Effort, Hearings before H. Committee on Naval Affairs, pursuant to H. Res. 30, p. 507; see also Hearings before S. Committee on Finance on H. R. 3687, p. 990; Hearings before H. Committee on Ways and Means on H. R. 2324, 2698 and 3015, pp. 109 and 110; Hearings before the Subcommittee of the S. Committee on Appropriations on H. R. 2996, p. 137.

the producers claimed would have reduced the minimum prices to which they were entitled under the Act. Stating that "executive officers may be restrained from threatened wrongs in the ordinary courts *in the absence of some exclusive alternative remedy*" (p. 290), this Court held that although the Act did not specifically grant producers a right to judicial review of the Secretary's action, "the Congressional grant of jurisdiction [to hear the] proceeding appears plain" (p. 307); that "the silence of Congress as to judicial review is, at any rate *in the absence of an administrative remedy*, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts" (p. 309); and that the Act provided "no forum, other than the ordinary courts, to hear [the producers'] complaint" (p. 309) [italics supplied].

In the instant case, an "exclusive alternative remedy"—the Tax Court—is "the forum, other than the ordinary courts" provided by Congress to hear respondent's complaints, and some judicial body, the Court of Claims or the district courts (depending upon the mode chosen to enforce the renegotiation order), affords respondent such review in addition to "administrative determinations" as the Constitution may require.[35]

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[35] The exclusive Tax Court remedy also disposes of respondent's argument (Br. in Opp. p. 38) that equity jurisdiction here may be based upon the danger of a multiplicity of suits.

IV

THESE PRINCIPLES APPLY TO A DECLARATORY JUDGMENT SUIT

Respondent's complaint in the district court sought both an injunction and a declaratory judgment (R. 10). The court below held that the district court had jurisdiction to issue a declaratory judgment and suggested that were the Declaratory Judgment Act not available the court "might go farther and hold" that the district court had jurisdiction to issue an injunction (R. 51). Under Point I of this brief, we have sought to show that the absence of a justiciable controversy bars either form of relief. Our arguments in Points I, II, and III suffice to indicate the unavailability, in any event, of the injunctive remedy, and we propose to show here that respondent's failure to exhaust its administrative remedies and to invoke the Tax Court's exclusive jurisdiction over review of renegotiation proceedings operates to preclude declaratory relief.

Respondent's suit being "essentially an equitable cause of action", the district court was as "free as in any other suit in equity to grant or withhold the relief prayed, upon equitable grounds." *Great Lakes Co.* v. *Huffman*, 319 U. S. 293, 300. The corollary of this principle is that a court may not, by declaration, "stop or interfere with administrative proceedings at a point where it would not, under settled principles, have

interfered with or stopped them under its power to enjoin". *Bradley Lumber Co.* v. *National Labor Relations Board,* 84 F. 2d 97, 100 (C. C. A. 5), certiorari denied, 299 U. S. 559. Thus in *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41, 46, and *Newport News Co.* v. *Schauffler,* 303 U. S. 54, 56, prayers for declaratory relief did not serve to take the cases from without the rule requiring exhaustion of administrative remedies.

Cogent reasons of policy require that a declaration be withheld where an injunction against a governmental function would not be granted. Cf. *Federation of Labor* v. *McAdory,* 325 U. S. 450, 463. While the declaratory judgment is not in form restrictive of continuation of the administrative process, its effect is often the same as an injunction. The administrative agency whose acts have been challenged in the courts will normally suspend the proceedings until the challenge has been adjudicated, and what is even more significant, will as a rule suspend similar proceedings against all in the same category as the plaintiff. This is graphically demonstrated in the instant case, where renegotiation proceedings to recapture excessive profits, if any, have been halted not only as against respondent, but also in respect of all other shipping companies which had operated under Red Sea Charters. The result is a virtual halt of the adminis-

trative functions to which the issue in suit is relevant, to the same extent as if all such functions had been enjoined.

This coercive aspect of the declaratory judgment suit against Government officers serves to distinguish the operation of that procedure against a private defendant. Unquestionably, the declaratory judgment has its value in resolving disputes between parties as a guide to their future conduct, even though no other traditional form of judicial relief is sought or is available. See Borchard, *Declaratory Judgments*, (2d ed. 1941) pp. 279, *et seq.*; Judicial Code, Sec. 274d (28 U. S. C. 400 (1)). Cf. *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227. Where the interests involved are purely private, there may well be more reason for resolving the dispute at the earliest justiciable stage; there is certainly not as much public or governmental interest in the resolution of the controversy in some other manner.

The contrary is true where the functions of government are involved, and where the act of government against a single individual or company serves as the pattern or prototype for similar acts against a great number of other individuals or companies similarly situated. Hence, a challenge as to the validity of a regulation, albeit by one individual, must be viewed as an attempt to stop the wheels of government to a

degree varying with the number of others in a like category. We submit that the same principles applicable to the grant of an injunction against a federal officer should control the grant or denial of a declaratory judgment, particularly where its effect would be to halt the administrative process on a broader scale than the plaintiff's interests alone. We see nothing in the Declaratory Judgment Act (28 U. S. C. 400) suggesting a Congressional purpose to sweep aside deeply rooted principles governing the appropriate relationship between courts and administrative agencies, and to permit litigants to make what has long been recognized to be an untimely attack upon administrative action. The principles which have long impelled courts of equity to withhold relief when administrative action was uncompleted are no less valid now than prior to the Declaratory Judgment Act. "A court of equity, which in its discretion may refuse to protect private rights when the exercise of its jurisdiction would be prejudicial to the public interest, * * * would seem bound to stay its hand in the public interest where it reasonably appears that the private right will not suffer." *Pennsylvania* v. *Williams*, 294 U. S. 176, 185; cf. *Hecht Co.* v. *Bowles*, 321 U. S. 321; *Harrisonville* v. *Dickey Clay Co.*, 289 U. S. 334, 338; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 672. The declaratory judgment, which likewise involves an

exercise of discretion (see *supra*, p. 55, and *Federation of Labor* v. *McAdory*, 325 U. S. 450, 462), should be governed by the same rules.[36] Here, the private right will not suffer from the denial of jurisdiction because respondent may obtain full relief without resort to the federal courts.

We think it clear that "there was an insuperable objection to the maintenance of [this] suit in point of jurisdiction", *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 52, but that at the very least, it can hardly be said, in the light of the considerations already adverted to, that there was an abuse of discretion in the denial of relief by the district court.[37]

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[36] The court below relied (R. 51) in part, upon a quotation from Borchard, *Declaratory Judgments* (2d ed. 1941) 878, to the effect that "where administrative authority over a particular transaction or business is in dispute, and, the facts being established, the issue of jurisdiction is purely one of law, there is no reason why the courts cannot make a declaration, although in some of these cases an injunction would be refused." Even if we assume this statement to be sound, it is clearly inapplicable to this case. For, as noted earlier (*supra*, pp. 26–28), the instant case is not one where the facts are established. The issue is a mixed question of law and fact of considerable complexity, requiring an extensive inquiry into the actual dealings between respondent and the Commission, for example, to determine whether there were negotiations and arrangements between them, which, apart from the charter parties themselves, gave rise to a renegotiable agreement between respondent and the Commission.

[37] Respondent argues (Br. in Opp. p. 38) that the Chairman might enforce a unilateral renegotiation order both by withholding sums otherwise due respondent, and by directing

V

THIS IS A SUIT AGAINST THE UNITED STATES TO WHICH THE UNITED STATES HAS NOT CONSENTED

Respondent's suit is directed against Federal officers to enjoin the performance of a function entrusted to them by statute and is based implicitly upon the assumption that the United States, in whose name the conduct complained of is being carried out, is as a matter of law not so directly involved as to deprive the court of jurisdiction. The theory must be that the defendants, by virtue of exceeding their statutory authority, are acting or about to act as trespassers in the sense of violating some legally protected right of the plaintiff, and that the overstepping of the statutory bounds strips the cloak of official authority from the defendants so that they act wrongfully as individuals rather than as agents of the Government. Cf. *Ex Parte Young*, 209 U. S. 123; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605.

While the point was not raised or argued in the court below, we believe it of sufficient impor-

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contractors to withhold sums due respondents; and that respondent would then find it necessary to institute a number of suits in both the Court of Claims and the district courts in order to challenge fully the renegotiation order. Such multiplicity is highly conjectural since the mode of enforcement of the hypothetical order lies in the future. Certainly, it is not impossible or unlikely that the Government would choose a method involving only one law suit. See also *supra*, p. 54, note 35.

tance to present it here. The sovereign immunity extends to suits "against its officers, agents, and representatives, where the [sovereign], though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U. S. 443, 506; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387.[38] In *Louisiana* v. *McAdoo*, 234 U. S. 627, 632, the Court, in speaking of suits to review the official action of the Secretary of the Treasury as to the rate which should be exacted under his construction of the Tariff Acts, observed that such suits "would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom and would obviously, in effect, be suits against the United States." We submit that the suit below was one against the United States, since a judgment rendered for the respondent would have a substantial impact upon the financial affairs of the sovereign.

This Court has recently applied the sovereign immunity doctrine in a suit against the Secretary of the Navy to enjoin one aspect of the renegotia-

[38] Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292, 296; *Hagood* v. *Southern*, 117 U. S. 52, 69; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457.

tion process (see *Mine Safety Appliances Co.* v. *Forrestal*, No. 71, this Term, decided December 10, 1945). There the renegotiation order had been issued, and the Secretary of the Navy sought to enforce it by withholding amounts otherwise due the contractor from the Government. A suit in the district court to enjoin such withholding was held barred by the absence of the United States as a party because the effect of the relief sought would be to compel the payment of money from the Federal Treasury.

Here, judicial aid is sought at a much earlier stage of the same type of proceeding. One reason, if not the principal reason, advanced by the court below for taking jurisdiction, is that the "investigation" to which the respondent might otherwise be subjected "might be followed by the sequestration of moneys due it by the United States on other contracts" (R. 50). But if those fears had been realized prior to the institution of the suit, relief would have been barred under the decision in *Mine Safety*, where the plaintiff also had sought both declaratory and injunctive relief (see slip opinion, p. 1). We know of no principle of law that would permit a plaintiff to obtain relief long prior to the occurrence of a feared event, where that event may never occur, if the same relief would be denied when the threat assumed concrete form.

Nor is there any principle of law which restricts the sovereign immunity, where the suit is nominally against the government officer, to cases where the relief sought would involve payment from the Government treasury. Thus, in *Belknap* v. *Schild*, 161 U. S. 10, the effect of the injunction sought against the official (to prevent patent infringement) would have been to stop the Government's manufacture of an article needed by the Navy. Likewise, in *In re Ayers*, 123 U. S. 443, the injunction would have prevented State attorneys from bringing certain suits for the collection of State taxes. Again, in *Louisiana* v. *McAdoo*, 234 U. S. 627, equitable relief would have prevented the Secretary of the Treasury from collecting less than the alleged legal tariff.

It is recognized that in certain cases the doctrine of sovereign immunity has not barred suits against Government officers, as individuals, for acts alleged to lie outside their constitutional or statutory authority. But we do not think the instant case falls within any of the situations in which an exception has been made to the rules enunciated above. One case in which relief has been granted involves a trespass to property. See *Mine Safety* case, slip opinion, p. 3; see also: *United States* v. *Lee*, 106 U. S. 196; *Poindexter* v. *Greenhow*, 114 U. S. 270; *Philadelphia Co.* v.

Stimson, 223 U. S. 605; *Goltra* v. *Weeks*, 271 U. S. 536. This case obviously does not fall within that category. Another exceptional situation is one in which an allegedly invalid regulation is about to have an impact upon the affairs or the conduct of the plaintiff. Such a situation is exemplified by *Ex Parte Young*, 209 U. S. 123, involving the fixing of railroad rates. This is likewise inapplicable here, since the renegotiation conference cannot possibly affect plaintiff's legal rights (cf. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41), and a renegotiation order, even if one were issued, is not self-executing.

There is a classification which superficially may seem pertinent—where the disregard of the administrative action, alleged to be unlawful, may result in criminal prosecution. See *Ex Parte Young*, 209 U. S. 123. Here, the statute provides criminal penalties for "wilfully" failing to comply with a "demand" for information. But it is plain that upon the allegations in the complaint, the plaintiff has failed to make out even a colorable case of a threat of prosecution. See discussion, *supra*, pp. 18–20.

The absence of a well-defined precedent to support this type of case, from the standpoint of sovereign immunity, requires dismissal of this suit because of sovereign immunity. Congress has consented to suit to resolve these questions in the Tax Court, and possibly thereafter in the Court

of Claims or the district courts, depending upon the mode of enforcement selected (see discussion, *supra*, pp. 51–53). Congress has not consented to initial review of these questions by declaratory judgment suit in the district court. On the contrary, Congress has carefully sought to bar such jurisdiction by giving the Tax Court exclusive jurisdiction. Cf. *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459. The conclusion for which we argue seems to be compelled here by the consideration that the instant suit halts the renegotiation process not only with regard to the plaintiff and his contracts, but with regard to every other contractor in a similar situation—here, some nineteen shipping companies which conducted some ninety voyages.[39]

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.

JOHN F. SONNETT,
Assistant Attorney General.

DAVID L. KREEGER,
ROBERT L. STERN,
Special Assistants to the Attorney General.

JOSEPH B. GOLDMAN,
Attorney.

JANUARY 1946.

[39] H. Rep. No. 2088, 78th Cong., 2d Sess., p. 2.

APPENDIX

UNITED STATES MARITIME COMMISSION,
Washington, September 11, 1945.

THE ACTING SOLICITOR GENERAL,
Washington 25, D. C.

DEAR MR. JUDSON: At the request of your representatives, I am submitting the following information concerning the authority, practice and procedure of the United States Maritime Commission Price Adjustment Board.

Section 403 (f) of the Renegotiation Act of 1942 (Sixth Supplemental National Defense Appropriation Act, 1942, approved April 28, 1942) provides that "Subject to any regulations which the President may prescribe for the protection of the interests of the Government, the authority and discretion herein conferred upon the Secretary of each Department may be delegated in whole or in part by him to such individuals or agencies as he may designate in his Department, * * * and he may authorize such individuals or agencies to make further delegations of such authority and discretion."

Pursuant to that provision, the Chairman of the United States Maritime Commission (who under subsection (a) of the Act is a "Secretary" of a "Department") delegated certain powers to the Price Adjustment Board by Administrative Orders establishing and defining the authority of the Board. Copies of these Administrative Orders

are enclosed and made a part of this letter by reference.

Under the authority vested in the Board by these Administrative Orders, it has been the uniform practice of the Board to arrange a conference with the contractor after obtaining information and data, which after being analyzed indicate that "excessive profits" within the meaning of the Act may have been realized by the contractor from contracts with the United States or subcontracts thereunder, as defined in Section 403 of the Act. In the conference the Board attempts to reach an agreement with the contractor as to the extent to which, if at all, profits realized under such contract are excessive, and as to a satisfactory method for eliminating any "excessive profits." If no agreement with the contractor is reached, the Board makes a recommendation in Memorandum form to the Chairman of the Commission that he formally find that "excessive profits" have been realized in the amount believed by the Board to be excessive. In order that the Chairman of the Commission may reach an independent decision in the matter, the Board recites in the Memorandum all of the salient facts and financial data, as well as all other important considerations, upon which its recommendation is based. If any question is raised as to whether the Act applies to the particular contractor or to any of his contracts under review, the Board obtains an opinion from the Legal Division of the Commission, and uniformly makes reference, in the same Memorandum, to such questions as well. These include such mat-

ters as whether a contract was with a "Department" within the meaning of the Act, whether final payment under the contract was made prior to April 28, 1942, whether the contract was completed or terminated in a fiscal year which closed more than one year before renegotiation proceedings were commenced, and similar questions as to application of the Act to the particular person or contract. It is also the Board's practice to draft and submit with its recommendation to the Chairman of the Commission, a proposed "unilateral order" for the Chairman's signature. If the recommendations and proposed order submitted by the Board are approved by the Chairman, the order is signed by him and issued as a unilateral order.

The Board, since its inception, has never issued, or asserted the authority to issue, a unilateral order on its own authority, and the Board has at no time understood the Administrative Orders referred to above as authorizing the Board to do more than to make recommendations to the Chairman of the Commission.

Sincerely,

John R. Paull,
JOHN R. PAULL,
Vice Chairman,
Price Adjustment Board.

Enclosures.

UNITED STATES MARITIME COMMISSION

WASHINGTON

Administrative Order No. 64

To All Employees of the United States Maritime Commission:

For the purposes of carrying out the provisions of Section 403 of the Sixth Supplemental National Defense Appropriation Act of 1942, insofar as relates to renegotiation of contracts and subcontracts thereunder and for related purposes, there is hereby created a Board to be known as the "Price Adjustment Board of the Maritime Commission."

The Board shall consist of a Commissioner of the Maritime Commission to be designated by the Chairman of the Commission, a representative of the Division of Finance to be designated by the Director of Finance with the approval of the Maritime Commission, and a third member who shall be selected with the approval of the Chairman of the War Production Board as his representative. Additional members of the Board shall be appointed by the Commission from time to time should it appear advisable. The Commission members shall act as Chairman of the Price Adjustment Board.

The Board is hereby charged with responsibility for bringing about such review of contract and subcontract prices as it may deem to be desirable, renegotiating, or causing to be renegotiated, such contract prices when, in its judgment, such action is necessary or desirable, and making such recommendations to the Commission as may be

appropriate to effectuate the results of such renegotiations.

The Board is also instructed whenever appropriate to function jointly with representatives or agencies of the Navy Department, the War Department, the War Production Board, and other Departments or Agencies of the Government.

To that end, the Board shall have the collaboration of the Commission's Purchase and Supply, Production, Finance, and Legal Divisions, and of such other officers and divisions of the Commission as may be appropriate, and in cases where it appears that costs or profits of contractors or subcontractors are, or may be excessive for any reason, shall initiate and be responsible for suitable action with a view to securing adjustments and refunds. The Board shall exercise such other powers not inconsistent with this order as may be delegated to it by the Commission or by the Chairman of the Commission. The Construction Review and Analysis Section of the Division of Finance, in conjunction with the General Auditor of Construction, will act as fact-finding agency for the Price Adjustment Board, and will, upon the request of the Price Adjustment Board, conduct, or cause to be conducted, investigations into the cost and profits of any contracts or subcontracts in which the Commission is interested.

The Price Adjustment Board, the Construction Review and Analysis Section and the Commission's General Auditor of Construction are authorized to make use of the facilities of the Securities and Exchange Commission, Federal Trade Commission, and other proper departments or

agencies of the Government in securing and assembling information.

The Price Adjustment Board is also authorized to call upon the Cost Analysis Section of the War Production Board to conduct general surveys of the profits and costs of holders of war contracts and industry-wide studies of a like nature, and through the Secretary of the Commission may request the Bureau of Internal Revenue to make available its services, with the approval of the Secretary of the Treasury, for the purpose of making examinations and determinations with respect to profits under such contracts or subcontracts. No audit shall be made pursuant to Executive Order No. 9127 without first advising the Cost Analysis Section of the War Production Board. This provision, however, does not apply to audits made in the normal course of the Commission's business otherwise than pursuant to such Executive Order.

All cost analysis reports and all information obtained from contractors, or otherwise by or for the Price Adjustment Board of the Maritime Commission, shall be available at all times to the corresponding Price Adjustment Boards of the War and Navy Departments and to the War Production Board.

Where contractors have contracts with either or both of the War and Navy Departments, as well as with the Commission, the Price Adjustment Board of the Commission shall agree with the Price Adjustment Board or Boards of the Departments involved as to how and by whom negotiations shall be conducted.

The Board shall keep a written record of each action taken by it. The Board may delegate to any one or more of its members the power to initiate investigations, request information and assistance on behalf of the Board and to represent the Board in negotiations with contractors.

By Order of the United States Maritime Commission.

(Sgd.) W. C. PEET, Jr.,
Secretary.

MAY 5, 1942.

UNITED STATES MARITIME COMMISSION,
OFFICE OF THE CHAIRMAN,
August 14, 1942.

By virtue of the authority vested in me by Section 403, Title 4, 6th supplement, National Defense Appropriation Act of 1942 (Public Law No. 528, 77th Congress, approved April 28, 1942), I hereby delegate to the Price Adjustment Board of the Maritime Commission, created by Administrative Order No. 64 of the United States Maritime Commission, dated May 5, 1942 and supplements thereto, all authority, duties and responsibilities therein set forth, provided, that renegotiation agreements shall not become final until approved by said Commission.

(s) E. S. Land,
E. S. LAND,
Chairman.

Delegation of Authority under subsection (f) of Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942. (Public 528, 77th Congress) approved April 28, 1942, as amended through July 1, 1943, herein referred to as the "Act"

to

Arthur G. Rydstrom, Commander U. S. N. R. for execution of clearance agreements

Whenever, as a result of renegotiation under the Act with a contractor or subcontractor assigned by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission, it shall have been found by at least two members of said Board that no excessive profits have been realized in the period or with respect to the contracts or subcontracts as to which such finding shall have been made, Arthur G. Rydstrom, Commander U. S. N. R., a member of said Board, is hereby authorized to enter into a final or other agreement with such contractor or subcontractor pusuant to subsection (c) (4) of the Act with full authority to execute the same on behalf of the Chairman of the Maritime Commission, representing the other Secretaries hereinafter referred to.

Provided, however,

(1) Nothing herein contained shall be construed as modifying the obligation of the Price Adjustment Board of the Maritime Commission and of the officer executing the final agreement hereunder, to observe and follow the principles,

policies and procedures as established from time to time by the Joint Price Adjustment Board;

(2) The agreements referred to herein commonly known as "Clearance Agreements" executed pursuant to this delegation of authority shall be on standard forms now in use by the Price Adjustment Board of the Maritime Commission and there shall be no substantial deviation therefrom without the prior approval of such Board;

(3) No contractor or subcontractor shall be required to inquire into the validity or regularity of any assignment by the Joint Price Adjustment Board to the Price Adjustment Board of the Maritime Commission and the signature of the said Arthur G. Rydstrom on behalf of the Chairman of the Maritime Commission shall be conclusive evidence of his authority to execute such agreements on behalf of the Secretary of the various Departments to which the Act applies;

(4) For the purpose hereof the term "Department" includes within its meaning the War Department, the Navy Department, the Treasury Department, the Maritime Commission, the War Shipping Administration, the Defense Plant Corporation, the Defense Supplies Corporation, the Metals Reserve Company or the Rubber Reserve Company, as the case may be, and the term "Secretary" includes within its meaning the Secretary of War, the Secretary of the Navy, the Secretary of the Treasury, the Chairman of the Maritime Commission, the Administrator of the War Shipping Administration and the Boards of Directors of the Defense Plant Corporation,

the Defense Supplies Corporation, the Metals Reserve Company and the Rubber Reserve Company. The term "Joint Price Adjustment Board" includes within its meaning the Board established by the Secretaries by memorandum dated September 24, 1943.

(5) This delegation of authority to execute clearance agreements on behalf of the various Secretaries is made pursuant to a cross delegation of authority which became effective on October 20, 1943 pursuant to which the authority and discretion so delegated to one of the Secretaries may be exercised by such individuals or agencies within his Department to whom like authority and discretion in respect of contracts with his Department, and subcontracts thereunder, may have been or may thereafter be delegated.

(6) The authority hereby delegated shall be effective as of 12:01 A. M. February 1, 1944 and shall be retroactive to that time and may be revoked or modified at any time thereafter.

EMORY S. LAND,
Chairman of the United States Maritime Commission.

Dated as of February 1, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1946